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From:

Sent: Monday, October 25, 2010 10:25:19 AM

To:

Cc:

Subject: Filing joint return after filing of substitute for return

You asked whether a taxpayer can elect joint status after the Service has filed a substitute for return under section 6020(b) and has issued a notice of deficiency to the taxpayer. The Tax Court held in Millsap v. Commissioner, 91 T.C. 926, 936-937 (1998), acq. in result, AOD-1992-03, that a taxpayer is not foreclosed from electing joint status after the Service has prepared a return under section 6020(b) because the return does not constitute a "separate return" filed by the individual for purposes of section 6013(b). Because the taxpayer has not previously filed a separate return in this case, section 6013(b) does not apply, therefore, the taxpayer may file a joint return provided that none of the exceptions in section 6013(a) apply.

Section 6013(a)(2) states that "in the case of death of one spouse the joint return may be made by the surviving spouse . . . if no return for the taxable year has been made by the decedent, no executor or administrator has been appointed, and no executor or administrator is appointed before the last day prescribed by law for filing the return of the surviving spouse." The facts that you provided did not state whether an executor or administrator had been appointed. Thus, if an executor or administrator was not appointed, the taxpayer may file a joint return with respect to himself and his deceased spouse. See IRC section 6013(a)(2).